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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted] 94

GEORGE SCHMIDT,

Petitioner,

vs.

ESQUIRE, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit.

JAY E. DARLINGTON
306 Hammond Building
Hammond, Indiana
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LA KEVIEW 5-6581

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OPINION BELOW.

The Court of Appeals decided this and two companion cases in one combined opinion entitled:

Schmidt v. *Esquire, Inc.*
Schmidt v. *Reader's Digest Association, Inc.*
Schmidt v. *Crowell-Collier Publishing Company,*
210 F. 2d 908
R. 67.

The opinion of the District Court (N. D. Ind.), unreported, so far as we know, is at R. 38.

Three Related Petitions in this Court.

Since this petition is being filed shortly before the effective date of the new Rules, it is impossible to combine these cases in one petition as contemplated by new Rule 23, par. 5.

But a similar result is accomplished by docketing the petitions in the same order the cases are discussed in the Court of Appeals' opinion: (1) the *Crowell-Collier* case, (2) the *Readers Digest* case, (3) the *Esquire* case.

The District Court denied plaintiff's motion to remand this case, substantially the same as in the *Crowell-Collier* case, and then granted this defendant's motion to dismiss for lack of process which was similar to the process in the *Reader's Digest* case.

Both in the District Court's opinion (R. 38) and in the Court of Appeals' opinion (R. 75), the remand question in this case was treated as identical with and decided upon the part of the Crowell-Collier opinion covering that subject. Similarly, the process question in this case, though not identical with the one in the *Reader's Digest* case, was treated as similar in the opinions, and the decision of that question was predicated largely upon the Reader's Digest opinions both in the District Court (R. 38) and Court of Appeals. (R. 78).

Copies of all petitions are being served on respondents in all three cases. (Respondents have the same counsel in the *Crowell-Collier* and *Reader's Digest* cases).

JURISDICTION.

Judgment of affirmance was entered in the Court of Appeals on February 24, 1954 (R. 79) and this petition is filed ninety days thereafter on May 25, 1954. There was no petition for rehearing.

Being a civil case, jurisdiction here is based on 28 U.S.C.A. 1254 and 2101.

QUESTIONS PRESENTED FOR REVIEW.

Accordingly, the question in this case on the motion to remand is the same as in the *Crowell-Collier* case, namely:

(1)

In denying plaintiff's motion to remand, the Court holds that the citizenship of *Tucker Corporation,* for whose benefit this derivative stockholder's action is brought, "is *immaterial* for the purpose of testing *diversity*" jurisdiction of this case which was *removed* from an Indiana state court, contrary to the settled doctrine that the corporation is always an indispensable party in a derivative action.

To reach this conclusion, the opinion goes into the *merits* of the complaint in fact and law, and concludes that the corporation does not have *title* to, and *right to sue* on, this cause of action. This, if true, would be a good defense in the state court after remand. But the further question is whether a District Court can turn a hearing on a plaintiff's motion to remand into a contest on the merits of his complaint.

On the process question, the question is similar to that in the *Reader's Digest* case, namely:

(1) Defendant having been sued in the Indiana state court and served with summons on the secretary of state as its statutory agent, moved for and obtained dismissal on the ground that it was not amenable to the process. Plaintiff's appeal from that judgment raises:

(a) The sufficiency of the factual showing made by defendant to support this motion.

(b) The Court of Appeals' failure to construe and apply the Indiana process statute in deciding this motion, while testing it solely by an inapplicable case, *Cannon* v. *Time* (4 Cir. 1940) 115 F. 2d 423.

(c) The application of the recent Supreme Court precedents to these facts, so far as not controlled by the statute.

STATUTES AND RULES INVOLVED.

On the remand question, the same statutes and rules are involved as in the Crowell-Collier petition, and petitioner asks leave to incorporate by reference that section of that petition.

On the question of process, the same statutes are involved as in the Reader's Digest petition, and petitioner asks leave to incorporate that section of that petition.

CONCISE STATEMENT OF THE CASE.

Complaint.

The complaint, filed the same day, is identical with the Crowell-Collier complaint except that it is based upon a different but similar article on the same subject, published in October instead of June, 1949. (R. 7)

Summons.

Summons were issued and served on the same day and similar manner as the Reader's Digest summons. (R. 27-28).

Motion to Dismiss.

Esquire's motion to dismiss was substantially similar to that of Reader's Digest, for alleged lack of lawful process (served through the Secretary of State). (R. 19).

Supporting the motion, defendant filed the affidavit of its Vice President and Director of Circulation, Blinder stating that it was not subject to service of process in Indiana when served, not licensed to do and has not done any business or engaged in any transaction in Indiana, has no address or bank account and maintains no stock in this state, and has never been in the state in any sense. It prints magazines in Illinois and mails them to subscribers in Indiana, and its magazines are placed in Indiana newsstands by an independent contractor. (R. 21-22.)

Supplemental affidavit of Blinder adds that defendant does not have in Indiana "any employees or agents to gather for it any material to be printed in the magazines it publishes" nor "any employees or agents to solicit advertising for its publications". (R. 31-32).

Motion to Remand.

Defendant had removed this case at the same time, on a petition substantially like Crowell-Collier's. (R. 3)

Plaintiff's motion to remand was filed at the same time and was practically identical in substance with the one in the Crowell-Collier case. (R. 34)

District Court's Opinion.

Filed the same day, the opinion adopts the Crowell-Collier opinion on the subject of remand, and denies the motion. (R. 38).

On the subject of process, the opinion adopts the Reader's Digest opinion and sustains defendants motion to dismiss the defendant for lack of lawful process. (R. 39).

The Court of Appeals' Opinion.

The opinion affirms on the remand question for the same reasons as stated regarding Crowell-Collier. (R. 75).

It affirms on the process question, impliedly adopting its legal discussion regarding Reader's Digest, and adding a brief resume of defendants affidavits. (R. 78).

ARGUMENT.

The remand question being identical and based on a common opinion below, petitioner asks leave to adopt by reference, all of Part I of its Argument in the *Crowell-Collier* case, pages 20-34.

The process question being similar as to law questions, though not the same as to facts, petitioner asks leave to adopt here the law points and authorities in Part II, at pages 21-24 of its Argument in the *Reader's Digest* case.

The Facts on Process.

While plaintiff filed no counter-affidavit as in the *Reader's Digest* case, because he had no information on defendant's operations beyond its affidavits, he contended below and does here that these affidavits, though slightly more informative than that of Reader's Digest, still fail to make sufficient *prima facie* proof to support the motion.

The Court of Appeals' opinion errs if it means to attribute to us a concession that this defendant is not present in Indiana for process. (R. 78). True, the statements in its affidavits do not show it *is* present, but, that is not test. Defendant has the burden of making adequate proof that it is *not* present.

Since *prima facie* jurisdiction of defendant's person appears from the allegations of the complaint laying the basis for serving defendant through the Secretary of State under Sec. 25-316 Burn's Ind. Sts. (R. 7, par. 1), and the sum-

mons and return are admittedly regular on their face (R. 4, 27-28), this creates a *prima facie* though rebuttable presumption of valid service (20 C. J. S., Corporations, Sec. 1948, page 221) and places the burden on defendant to challenge the jurisdiction of its person, if it wishes, by proper pleading and *sufficient proof,* otherwise the objection is waived and the jurisdiction stands. (20 C. J. S., Corporations, Sec. 1949, page 222.)

Esquire's affidavit (R. 21) and supplement thereof (R. 31) are more adequate than the affidavit in the *Reader's Digest* case, but it, too, is composed largely of conclusions that Esquire is "not subject to service of process in the state" and "not doing business" in the state (R. 21) plus the facts that it has "no office" and "no bank account" in the state (R. 21) which are immaterial. (*International Shoe Co.* v. *State of Washington,* 326 U. S. 310, at p. 313.)

But the affidavit does include one short conclusory statement that defendant "never had any *agents* in the State of Indiana who solicit or solicited * * * *subscriptions*" (R. 22),—a statement which was totally lacking in the Reader's Digest affidavit and which Reader's Digest could not put in its affidavit without being guilty of perjury (No. 10907, R. 46, 48). If it were necessary to test the sufficiency of this statement in Esquire's affidavit, we believe it would be insufficient because:

What constitutes an "agent" is a matter of law and Esquire might well be handling the subscriber-obtaining part of its business in Indiana by means which it does not consider agency. The affidavit states that its magazines "are obtainable in the State of Indiana *either* through *subscriptions* or at newsstands" (R. 22) but it is silent as to the manner by which it obtains the subscriptions in the state except the above denial that it does it by "agents." Also the affidavit totally fails to deny that it has agents or

employees in Indiana *generally.* Its denial is confined to lack of subscription-soliciting agents (R. 22) and material-gathering and advertising-soliciting agents. (R. 31-32.)

If necessary to be decided, the above deficiencies would appear to amount to a *failure of proof* of an essential element of defendant's motion, in view of the fact that the magazine publishing business has a number of "essential factors," including the obtaining of subscribers (*Consolidated Cosmetics* v. *D-A. Pub. Co.* (7 Cir. 1951), 186 F. 2d 906, 908), plus the doctrine that silence of a party upon a fact peculiarly within his knowledge raises a presumption that the fact is against him, particularly when he has the burden of proof on the point. This doctrine, which serves an important function in the law of evidence generally by enabling courts to resolve questions where facts are not clear because of the silence or evasiveness of the party possessing them (31 C. J. S., Evidence, at pages 849-850; *Runkle* v. *Burnham* (1894), 153 U.S. 216, 225, 14 S. Ct. 837, 842), applies to proof of a motion attacking the court's jurisdiction of defendant's person by affidavits:

> *Industrial Research Corp.* v. *General Motors Corpn.* (D. C. Ohio 1928), 29 F. 2d 623, 627, point 10.

In the present *Esquire* case, plaintiff was not able to get hold of contradictory facts or documents on this subject and introduce them in a counter-affidavit as he does in the *Reader's Digest* case, but neither was there any counter-affidavit or counter-proof by the plaintiff in the last cited case. There the defendant supported its motion with three affidavits similar to and at least as adequate as defendant's affidavits in this case (p. 625) but the Court held them insufficient to sustain the burden of proof, and as a consequence this "*allows an acceptance of the allegations*

of the bill in this respect as a *true statement''* of the facts supporting jurisdiction of defendant's person. (29 F. 2d 623, at p. 626.)

Wherefore, petitioner prays that this Honorable Court may grant its writ of certiorari to bring up and review this case, and for all other just and proper relief.

JAY E. DARLINGTON,
Attorney for Petitioner.

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IN THE

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OCTOBER TERM, 1953.

No. [redacted] 94

GEORGE SCHMIDT,

Petitioner,

vs.

ESQUIRE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LE ROY RUSSELL KREIN,
1 North La Salle Street,
Chicago 2, Illinois,
Attorney for Esquire, Inc.,
Respondent.

THE GUTHRIDGE-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 787.

GEORGE SCHMIDT,

Petitioner,

vs.

ESQUIRE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court (N. D. Ind.) is unreported but is in the Record (R. 38-39). It refers to two other memoranda (R. 52-57). The opinion of the Court of Appeals (R. 67-78) is reported in 210 F. 2d 908.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition (pages 2-3).

QUESTIONS PRESENTED.

1. In a derivative stockholder's action (commenced in an Indiana state court and removed by respondent) brought by an Illinois citizen who owned stock in the Tucker Cor-

poration against that corporation and respondent, both Delaware corporations, was the Tucker Corporation properly disregarded for diversity jurisdiction purposes where the complaint showed, as a matter of law, that the Tucker Corporation was a mere nominal party and was not an indispensable party because it had no rights in the matter, the cause of action, if any, being owned instead by a federal reorganization trustee.

2. Was the respondent's motion to dismiss properly granted on the ground that the court lacked jurisdiction over respondent?

STATUTES AND RULES INVOLVED.

The pertinent statutes and rules are incorporated by reference on page 4 of the Petition to other Petitions filed by plaintiff on the same day.

STATEMENT OF THE CASE.

On March 1, 1951 the Petitioner, herein referred to as plaintiff, filed a Complaint in the Lake Circuit Court, Lake County, Indiana against Esquire, Inc., a Delaware corporation, respondent, herein referred to as defendant, and Tucker Corporation, a Delaware corporation (R. 7-18). The plaintiff, an Illinois citizen, alleged that he was a stockholder in the Tucker Corporation and brought the suit on its behalf for alleged damages arising out of an article that appeared in defendant's magazine "Coronet", November, 1949 issue, which plaintiff stated was actually published and circulated on or about October 21, 1949.

The Complaint further alleges (R. 11) that on March 3, 1949 (*prior to the publication of the article complained of*) trustees of the Tucker Corporation had been appointed by the Federal Court in a Chapter X reorganization proceed-

ing under the bankruptcy act and that the Court on that date approved the petition for reorganization. The Complaint goes on to state that the reorganization proceeding is still continuing, with no reorganization plan approved and with slight chance that one will be, and states that the acting trustee is John Chatz and his attorney is Norman H. Nachman.

A copy of the March 3, 1949 Order of the United States District Court for the Northern District of Illinois is in the printed transcript (R. 45-51).

The plaintiff claims that the trustee abandoned the alleged cause of action to the corporation on and since February 20, 1951. The plaintiff alleged that he had a conversation with the attorney for the trustee on February 20, 1951 requesting him to sue on the cause of action but the attorney for the trustee stated in substance that he would not do so and considered the cause of action to be non-existent and not an asset of the corporation's estate. This was on a Tuesday. On Friday, February 23, 1951 plaintiff's counsel sent a letter to the attorney for the trustee, with copies to the trustee and the court, stating that he intended to file the action as one that had been abandoned by the trustee and requested to be notified if such was not the position of the trustee and the court. The plaintiff alleged that the trustee and the court remained silent (R. 12).

The plaintiff alleged that on February 24, 1951 (a Saturday) he sent letters to the corporation's president, three vice-presidents and a majority of its board of directors demanding that they cause the corporation to sue upon the cause of action. They remained silent. Plaintiff further alleged that the corporate management and board of directors is incapable of taking action, that they are widely scattered, that they have not met for a long time and are not likely to meet for the conduct of this or other corporate affairs. At the time these letters were sent by plaintiff's

counsel, plaintiff admits that the corporation "had no functioning management" (R. 1).

As above stated, the Complaint was filed by the plaintiff on March 1, 1951.

On March 2, 1951 the Secretary of State of Indiana was served with summons purportedly as the statutory agent of defendant, and a copy of the summons was sent by mail to defendant at Chicago, Illinois where it was received on March 3, 1951 (R. 27-29).

On March 6, 1951 the Tucker Corporation was purportedly served with summons by personal service in Lake County, Indiana made upon one Fred Rockelman, vice president (R. 27), whose residence was the Windermere Hotel, 1642 East 56th Street, Chicago, Illinois (R. 24). No appearance was filed by Tucker Corporation and it did not participate in any of the proceedings in the District Court or the Court of Appeals.

On March 15, 1951 the defendant filed its removal petition (R. 3-18) and bond (R. 18-19) and duly notified the parties (R. 23-24). A copy of the removal petition was filed in the Lake Circuit Court on March 16, 1951 (R. 24).

On March 16, 1951 the defendant filed in the District Court "Consolidated Motions under Rule 12" supported by an affidavit of A. L. Blinder, its vice president and Director of Circulation (R. 19-23) and on March 29, 1951 filed a supplemental affidavit (R. 31-32).

No opposing affidavits were filed by the plaintiff.

On August 26, 1952 the parties were notified by the District Judge that the case was set for hearing on Monday, September 22, 1952.

The plaintiff thereafter served and filed his Motion to Remand on September 16, 1952 (R. 32-33) and filed his Amended Motion to Remand on September 22, 1952 (R. 34-37).

On September 22, 1952 the District Court heard extensive arguments on all motions simultaneously and gave the plaintiff permission to file counter-affidavits (R. 37). None was filed.

On April 23, 1953 District Judge Luther M. Swygert entered an order denying the amended motion to remand and dismissed the action (R. 38) supported by a Memorandum (R. 38-39) in which the Court referred to other memoranda involving different defendants in other suits then before the court which memoranda are in the printed transcript (R. 52-57).

On February 24, 1954 the United States Court of Appeals for the Seventh Circuit affirmed (R. 67-78).

ARGUMENT.

The plaintiff in his Petition for a Writ of Certiorari, including its many cross-references, argues that the decision of the Court of Appeals was erroneous. Admittedly, the Court of Appeals was aware of the legal arguments, propositions of law and cases relied upon and cited by plaintiff, and its decision (R. 67-78) clearly reflects that it gave most careful consideration to them, but the plaintiff argues that the Court failed to correctly apply these principles to the facts of his case and therefore certiorari should be granted. The respondent contends that the decision of the Court of Appeals was correct in all respects and that the Petition does not present any adequate reason why certiorari should be granted. The writ should be denied.

There is no conflict of decision and no important question of Federal law requiring decision by this Court. Nor does the decision below call for an exercise of the supervisory powers of this Court.

Under the facts in this case, the alleged cause of action belonged to the trustee in the federal reorganization proceeding. The respondent's article was published after the appointment of the trustee. The plaintiff did not even attempt to properly secure the consent or authorization of the bankruptcy court before bringing his action. He did not file a petition in the bankruptcy court with notice to all interested parties, including creditors. He did not secure either an assignment of the claim to the Tucker Corporation or the right to enforce any legal right vested in the trustee. The Tucker Corporation had no cause of action or rights in the matter and although it was named as a party by plaintiff it was a mere nominal party and was not an

indispensable party. It was properly disregarded in determining diversity jurisdiction.

We do not believe that the principle of abandonment is even applicable here. The plaintiff claims that this principle gave the Tucker Corporation title to something that it did not admittedly own before the reorganization petition was filed. We have seen no authority in support of such an application of the doctrine of abandonment. But even assuming that the doctrine of abandonment is applicable here, this principle does not help the plaintiff. The Court of Appeals exhaustively covered this point in its opinion. An Illinois state appellate court held likewise. Numerous other courts have denied a claim of abandonment under facts that would appear more favorable to support the claim than are the facts in the instant case and even without the consideration of any rule such as local bankruptcy rule 19 of the District Court for the Northern District of Illinois.

The motion to dismiss was properly granted because the court lacked jurisdiction over respondent. The facts set forth in the two affidavits (R. 19-23, 31-32) conclusively show that the respondent was not carrying on in the State of Indiana any of its functions and was clearly not doing business and was not engaging in any transactions in such state. Under Indiana state law it was not suable there (R. 39, 53) nor could it possibly have been suable there because of the lack of necessary contacts within the state (R. 78).

I.

The Tucker Corporation Was Properly Disregarded for Diversity Jurisdiction Purposes.

In diversity jurisdiction questions, the courts are concerned only with indispensable parties and this issue is one for the proper determination of the District Court in

connection with a motion to remand. *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182. See also: *Leadman* v. *Fidelity & Casualty Co. of New York*, 92 F. Supp. 782; *Shattuck* v. *North British & Mercantile Ins. Co.* (C. C. A. 8, 1893), 58 Fed. 609; *Henderson* v. *Cabell*, 43 Fed. 257; *Hann* v. *City of Clinton* (C. C. A. 10, 1942), 131 F. 2d 978, 981.

Usually in a derivative shareholder's action the corporation is a necessary party. *Davenport* v. *Dows*, 85 U. S. (18 Wall.) 626. There are exceptions. The corporation is not a necessary party if it has been dissolved or is defunct. *McClean* v. *Bradley*, 282 Fed. 1011; *Weinert* v. *Kinkel*, 296 N. Y. 151. Another exception arises when a corporation is placed in receivership. If the receiver of a corporation does not sue, upon proper leave of court he himself is made a defendant in any suit by stockholders. *Porter* v. *Sabin*, 149 U. S. 473, 478. The reasoning of the receivership cases is pertinent to the instant case because it involves a Chapter X corporate reorganization proceeding under the bankruptcy act in which the reorganization trustee is vested with complete legal title to all of the property, including rights of action, of the debtor. This Court in *Meyer* v. *Fleming*, 327 U. S. 161, 169, a corporate reorganization case, cited *Porter* v. *Sabin*, 149 U. S. 473 and *Klein* v. *Peter* (C. C. A. 8, 1922), 284 Fed. 797, both receivership cases. Furthermore, under Chapter X of the bankruptcy act, 11 U. S. C. A. 587, if authorized by the judge, the appointed trustee will have all the "rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor." The trustees of the Tucker Corporation were given such additional rights and powers of a receiver in equity (R. 47).

In *Porter* v. *Sabin*, 149 U. S. 473, stockholders brought suit against certain former officers of their company. At

the time of the suit the company was in receivership. The defendants demurred to the complaint on the ground that the state court had exclusive jurisdiction of the cause of action and because the receiver was not made a party. The demurrer was sustained and the decision of the lower court was affirmed. It appeared that the court which appointed the receiver denied his petition for authority to bring suit as well as an application of the plaintiffs for leave to make him a party to their suit. This Court pointed out that the state court could have permitted its receiver to sue or be sued but until it did so the right of action of the corporation against its delinquent officers was within the exclusive jurisdiction of that court, and stated on page 480:

> "The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government, can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other."

In *Klein* v. *Peter* (C. C. A. 8, 1922), 284 Fed. 797, stockholders brought suit against the corporation and its officers. The corporation was in receivership and it appeared that the stockholders had applied to the receivership court requesting authority for the receiver to bring the action. The receivership court refused this application. The stockholders' action was dismissed and the Court of Appeals affirmed, stating on page 799:

> "It is the general rule that, where a corporation is in the hands of a receiver, a stockholder cannot sue without the sanction of the court appointing the re-

ceiver. And it is further the general rule that such stockholder cannot sue, even where the court has granted him permission to do so, *where there is no order purporting to assign to him or to confer on him the right to enforce the claim vested in the receiver.* The property of the corporation, which would include claims of action on behalf of the corporation is in the possession and custody of the court, held by the receiver as an officer of the court. In a suit by a stockholder in behalf of the corporation the real controversy is between the corporation and the person whose acts are complained of, and the suit is for the benefit, not of the individual, but of all the stockholders. Where the corporation is in the hands of a receiver, the right of action by the receiver to protect the interest of the corporation is exclusive." (Italics ours.)

In *Swope* v. *Villard, et al.* (C. C. N. Y., 1894), 61 Fed. 417, the court held that a stockholder of a corporation that is in a receiver's hands has no right to sue upon a cause of action in favor of the corporation, upon refusal of the receiver to sue on the stockholder's request, without showing that he has asked the court that appointed the receiver to direct him to sue.

In *DeVan, et al.* v. *United States, et al.* (D. Ct. N. J., 1943), 50 F. Supp. 992, the shareholders of a corporation filed a suit against the United States for certain tax refunds due their corporation. The corporation was in receivership and the court had directed the abandonment of the claim of the receiver against the United States. The court held that the plaintiffs could not sue and stated on pages 994-995:

> "The right to determine whether a cause of action existed was within the exclusive jurisdiction of the Delaware Court of Chancery and to permit the plaintiffs to maintain this action would be to flout the jurisdiction of that court. This court cannot lend itself to such a procedure.
>
> . . .

"It is clear that what rights the plaintiff had to maintain an action for the benefit of the Delaware Corporation were lost to them upon the appointment of the receiver, since the right of action by the receiver to protect the interests of the corporation is exclusive. *Swope* v. *Villard*, 61 F. 417; *Klein* v. *Peter*, 284 F. 797; *Porter* v. *Sabin*, 149 U. S. 473; *Atkins* v. *W. A. Harriman & Co., Inc.*, 2 Cir., 69 F. 2d 63."

In *Kelly* v. *Dolan, et al.* (C. C. A. 3, 1916) 233 Fed. 635, the plaintiff-stockholder filed a stockholders' bill against certain defendants, including the receiver of his corporation. The receivership court had refused to allow the receiver to sue but granted leave to the plaintiff-stockholder to sue. The plaintiff's bill was dismissed and the Court of Appeals affirmed and stated on page 639:

"But leave to sue went no further than permission to sue, and no order was made, even if such a thing were possible, purporting to assign to the stockholder the claim vested in the receiver, or to confer on the stockholder a right to enforce the legal right vested in the receiver."

As the above cases clearly show, pending reorganization or receivership proceedings, the assets of the debtor are in *custodia legis* and neither the debtor nor any shareholder on its behalf has any right to sue, except as directed by the court. Neither have the creditors. *Gochenour* v. *Cleveland Terminals Bldg. Co.* (C. C. A. 6, 1941), 118 F. 2d 89, 94-95; *Gochenour* v. *George & Francis Ball Foundation*, 35 F. Supp. 508, 517; *Trimble* v. *Woodhead*, 102 U. S. 647, 650; *Glenny* v. *Langdon*, 98 U. S. 20; *Reagan* v. *Midland Packing Co.* (C. C. A. 8, 1925), 8 F. 2d 954, 956.

In *Meyer* v. *Fleming*, 327 U. S. 161, 169, this Court stated that if a shareholder desires to file a stockholder's derivative action *after* a petition in a reorganization proceeding involving his corporation has been approved (the facts in the instant case) he can do so only with the "consent of

the bankruptcy court" for "it has exclusive authority to determine how causes of action which have become a part of the bankruptcy estate shall be enforced." The cases discussed above show that such consent is only secured by filing a petition in the bankruptcy court (with notice to all interested parties, including creditors) and securing either an assignment of the claim or the right to enforce the legal right vested in the trustee. The plaintiff failed to properly seek or secure an assignment of the claim to the Tucker Corporation, and the Tucker Corporation had no rights, title or interest in the matter as a matter of law, and had no rights that a shareholder could assert on its behalf. Accordingly, the Tucker Corporation was not an indispensable party. It is named as a party by the plaintiff but at the most it is a mere nominal party with no rights in the matter and was correctly disregarded for diversity jurisdiction purposes. As *Davenport* v. *Dows*, 85 U. S. (18 Wall.) 626, points out, a corporation is an indispensable party defendant in a stockholder's derivative action when "the rights of the corporation are involved."

The plaintiff contends that the trustee abandoned his alleged cause of action against defendant for libel and that it became the property of the Tucker Corporation. The facts with respect to this alleged abandonment are set forth by the plaintiff in paragraph 12 of his complaint (R. 12).

It is the contention of the defendant that the doctrine of abandonment is not applicable here. This doctrine only concerns *property that was owned by the bankrupt or debtor prior to the time of the appointment of a trustee.* If the trustee abandons such property, title is considered as either *revesting* in the bankrupt or as having *never passed from* the bankrupt. The plaintiff has not cited a single case holding that the doctrine of abandonment is applicable where, as in the instant case, the property (cause of action) was not owned by the debtor prior to the ap-

pointment of the trustee. It is impossible to follow the plaintiff's argument as to how the Tucker Corporation would have become the owner of this alleged cause of action against defendant, even if the trustee abandoned same. The plaintiff ignores the fact that there are creditors in the reorganization proceeding (R. 46), whose rights are paramount to those of stockholders. No assignment of this alleged cause of action was ever made by the trustee to the Tucker Corporation.

But even if the doctrine of abandonment were applicable, it would be of no benefit to plaintiff. The District Court (R. 38, 56), the Court of Appeals (R. 73-74) and the Appellate Court of Illinois in the case of *Schmidt* v. *Crowell-Collier Pub. Co.*, 349 Ill. App. 229, 234, in carefully prepared opinions, held that as a matter of law the facts in the complaint showed that there was no abandonment by the trustee; that while the reorganization proceeding was pending orders could be entered therein determining the controversy and that the conversation with and letter to the attorney for the trustee, with copies to the trustee and the court, bound neither the trustee nor the court and were ineffective. They held that the court in a pending proceeding acts only through its orders.

If the District Court in the Tucker reorganization proceeding had entered an order directing that the trustee was not to abandon any assets except by express order of court, we assume that even the plaintiff would agree that no abandonment could be made by the trustee without an express order of court. In effect, the judges of the United States District Court for the Northern District of Illinois have done just that. Rule 19 of the local rules in bankruptcy for said court provides in part as follows:

> "The trustee may, *upon approval by the Court*, abandon any property of the bankrupt if burdensome or of no net realizable value."

The rule undoubtedly contemplates approval by the Court pursuant to a regular petition filed in the bankruptcy proceeding, after notice to all interested parties, including creditors. Otherwise, the rule would have no significance. This was the holding of the Court of Appeals (R. 74-75).

The Court of Appeals (R. 73) upheld the validity of this Rule 19 and cited ample authority for its ruling. See also: *Lincoln Nat. Life Ins. Co.* v. *Scales* (C. C. A. 5, 1933), 62 F. 2d 582, 585 and *Fazakerly* v. *E. Kahn's Sons Co., et al* (C. C. A. 5, 1935), 75 F. 2d 110, 114 in which the courts exercised their authority over abandonment questions in pending matters even without any local rule such as Rule 19.

Furthermore, plaintiff has cited no case holding that there is an abandonment by the trustee under facts similar to those present in the instant case. The statements of counsel for the trustee merely showed that he did not feel that a cause of action existed. If the plaintiff had filed a petition in the reorganization proceeding and after a full hearing attended by all interested parties including creditors the court had directed the trustee to bring suit, there is nothing to indicate that the trustee would not have obeyed such order of the court. Certainly, there is nothing in the record to indicate that the trustee assigned to the Tucker Corporation the alleged cause of action owned by the trustee. Although the trustee is required to give notice to creditors (11 U. S. C. A. 94(a)(4)) of all proposed *sales* of property, the plaintiff contends that the Tucker Corporation was *given* this cause of action by the trustee in this most informal manner, a cause of action which the plaintiff considered at that time "valuable to the corporation." (R. 11.)

We submit that there is no case that supports this extraordinary theory of plaintiff.

In *Lincoln Nat. Life Ins. Co.* v. *Scales* (C. C. A. 5, 1933), 62 F. 2d 582, 585, the court stated:

> "While the trustee in bankruptcy takes title, he is not like the trustees under deeds and wills who, though having a right to seek direction of a court of equity in cases of difficulty, may have large authority to act as owners without court aid. The bankrupt's property is in *custodia legis* from the filing of the petition. Thereafter no other court can exercise any jurisdiction over it without consent of the bankruptcy court."

In *Fazakerly* v. *E. Kahn's Sons Co., et al.* (C. C. A. 5, 1935), 75 F. 2d 110, at the request of the bankrupt's attorney and without any opposition from the trustee, a referee entered an order releasing certain claims to the bankrupt against large meat and produce packers under the anti-trust laws. This was done without a hearing of any kind and without notice to creditors. The Court of Appeals stated on page 114:

> "* * * the failure to list it as an asset or otherwise disclose to the creditors the existence of the claim, are such as to prevent a finding that the action of the trustee has resulted in an abandonment of the claim * * *"

Although on page 37 of the Petition in Docket number 785 petitioner asserts that there have been many abandonments without orders of court in the Northern District of Illinois since Rule 19 was adopted, this is the first time that we have heard of such a statement and it is not supported by anything in the Record.

The plaintiff contends that there was an abandonment although no formal hearing was held, no creditors were given an opportunity to be heard or even notified, no order of court was entered assigning the cause of action to the Tucker Corporation, no petition of any kind was

presented to the court by the Tucker Corporation or by the plaintiff requesting the trustee to sue or to assign the cause of action to the debtor, and no elements of estoppel are present.

None of the cases cited by the plaintiff is pertinent to the facts in the instant case and none supports his contention.

In *Sessions* v. *Romadka,* 145 U. S. 29, the bankrupt secured a patent in 1872 which he did not consider of any value. In 1877 the assignee was discharged. The plaintiff purchased the patent from the former bankrupt in 1878 having been told by the assignee that he would have to go to the former bankrupt to get title. The patent became valuable only when the plaintiff had brought to bear upon the manufacture of the device his own skill and enterprise. The Court found that full legal title was in the plaintiff.

In *Mills Novelty Company* v. *Monarch Tool & Mfg. Co.* (C. C. A. 6, 1931), 49 F. 2d 28, the bankrupt owned an interest in a patent application at the time of bankruptcy. In 1915, the bankrupt was discharged. The trustee was also discharged. In 1916, the patent issued to the former bankrupt and his co-owner and both of them sold their interest to the plaintiff. The court held that when the patent issued it became a matter of public record, and as the trustee had not taken any steps towards securing the patent in over ten years since its issuance the court found full legal title in the bona fide purchaser.

In each of these cases the Court found that the plaintiff bringing the patent infringement action had the complete and legal title to the patent and had full right and authority to institute the action. In our case, the lower Courts correctly held that the Tucker Corporation did not have title to the alleged cause of action and that the

plaintiff did not have the right and authority to institute the action.

II.

The Action Was Properly Dismissed for Lack of Jurisdiction Over Respondent.

Service of summons was made on the respondent (R. 28) by serving the Secretary of State of the State of Indiana. The relevant statute is Section 25-316, Burns Annot. Indiana Statutes, Acts 1939, ch. 60, which is printed beginning on page 3 of the Petition in Docket No. 786.

The District Court held that the facts disclosed in the affidavits filed by the respondent (R. 21-23; 31-32) showed, as a matter of law, that the service upon the Secretary of State was improper and unauthorized under the Indiana Statute.

Although the plaintiff was granted leave even after the oral orgument in the District Court below to file counter-affidavits (R. 37) he failed to do so. The averments of fact contained in the affidavits must be deemed admitted for the purpose of the motion. *Rohlfing* v. *Cat's Paw Rubber Co.*, 99 F. Supp. 886, 893; *Fulton* v. *Twentieth Century-Fox Film Corp., et al.*, 111 F. Supp. 874. The motion was properly before the court on the affidavits. Federal Rules of Civil Procedure, 12 (b); 12 (d); 43 (e); 81 (c); *Merrimon* v. *Martindale-Hubbell, Inc.*, 36 F. Supp. 182; *Lauricella, et al.* v. *Evening News Pub. Co.*, 15 F. Supp. 671.

It was held in *Consolidated Cosmetics* v. *D-A Pub. Co., Inc.* (C. C. A. 7, 1951), 186 F. 2d 906, 908, that the functions of a magazine publishing company include "gathering material to be printed, obtaining advertisers and subscribers, printing, selling and delivering the magazines for sale".

A corporation is an artificial person. It can only act and be bound by its agents. The facts set forth in the two affidavits filed by respondent conclusively show that the respondent was not carrying on in the State of Indiana any of its functions and was clearly not doing business and was not engaging in any transactions in such state.

In the case of *Industrial Research Corp.* v. *General Motors Corp.* (D. Ct. Ohio, 1928), 29 F. 2d 623, cited by plaintiff on page 9 of his Petition, the defendants in their affidavits did not deny or explain certain material allegations of the complaint and, furthermore, the plaintiff therein had introduced certain strong documentary evidence.

The State of Indiana permits solicitation within the State without making the foreign corporation amenable to process. See: *Mutual Mfg. Co.* v. *Alpaugh*, 174 Ind. 381, 385; *Wright* v. *J. R. Watkins Co.*, 86 Ind. App. 695, 698.

Inasmuch as the affidavits disclose that the respondent does not even solicit advertising, subscribers, or material within the State of Indiana, and that it does not print or deliver its magazines within the State of Indiana, it is clear that under the law of Indiana the defendant was not subject to service of process and that the process served on the Secretary of State as its purported agent was improper and unauthorized.

Furthermore, service upon the Secretary of State of Indiana is only authorized under the Indiana Statute where the action arises out of an act or thing done by the foreign corporation within the State of Indiana. The magazines of the defendant are printed in Chicago, Illinois and if the single publication rule applies, *Hartmann* v. *Time* (C. C. A. 3, 1948), 166 F. 2d 127, 134; *Winrod* v. *Time, Inc.*, 334 Ill. App. 59; *United States* v. *Smith* (D.

Ct. Ind., 1909), 173 Fed. 227, the alleged cause of action arose in Illinois and not by reason of any act of the defendant in Indiana. Compare *Nichols* v. *Cowles Magazines, Inc.*, 103 F. Supp. 864; *Partin* v. *Michaels Art Bronze Co., Inc.* (C. C. A. 3, 1953), 202 F. 2d 541.

There was in the past excellent reason why state statutes limited service on statutory agents to cases where the causes of action arose within the state. *Perkins* v. *Benguet Consolidated Mining Company*, 342 U. S. 437, 443-444.

Not only was service of process on the Secretary of State of Indiana invalid under Indiana law but, as the Court of Appeals held (R. 78), no matter how broad the Indiana statute could possibly be construed, the respondent clearly was not amenable to suit in Indiana. A defendant must have at least some minimum contacts within the territory of the forum of such character that the maintenance of the suit does not offend traditional ideas of fair play and substantial justice. *International Shoe Company* v. *State of Washington*, 326 U. S. 310.

The respondent has no such contacts. Compare *Layne* v. *Tribune Co.* (C. A. D. C., 1934), 71 F. 2d 223; *Neely* v. *Philadelphia Inquirer Co.* (C. A. D. C., 1932), 62 F. 2d 873; *Cannon* v. *Time, Inc.* (C. C. A. 4, 1940), 115 F. 2d 423; *Merrimon* v. *Martindale-Hubbell, Inc.*, 36 F. Supp. 182; *Lauricella, et al.*, v. *Evening News Pub. Co.*, 15 F. Supp. 671; *Whitaker* v. *Macfadden Publications, Inc.* (U. S. D. C., 1939), 105 F. 2d 44; *Moorhead* v. *Curtis Pub. Co.*, 43 F. Supp. 67, 69.

As the Court of Appeals conclusively stated in its opinion below (R. 77-78):

> "The question of personal jurisdiction in the *Esquire* case may be quickly disposed of. Affidavits filed with the District Court disclose the following: Esquire,

Inc., is a corporation foreign to the State of Indiana and is not licensed nor admitted to do business there. It publishes the Esquire and Coronet magazines, which are available in Indiana either through subscription or at the newsstand. These magazines are printed in Chicago and are mailed directly from there to Indiana subscribers. They are placed on newsstands in Indiana by the Curtis Circulation Company, an independent corporation which purchases the magazines from Esquire and effects distribution through independent wholesale organizations. Esquire has no office of any kind in Indiana, and it has no employees or agents there to gather material for publication, nor to solicit advertising, subscriptions or newsstand sales.

"Under these facts, we do not see how it can seriously be contended that Esquire was amenable to suit in Indiana."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LE ROY RUSSELL KREIN,
Attorney for Respondent,
Esquire, Inc.